

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

TENDERCARE (MICHIGAN), INC.,
d/b/a TAYLOR TOTAL LIVING CENTER
and ADRIAN HEALTH CARE CENTER

Employer

and

CASES 7-RC-21686 and
7-RC-21687

LOCAL 79, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

Petitioner

APPEARANCES:

Daniel Pierce, of Lincoln Park, Michigan, for the Employer.

Krista Sturgis, of Detroit, Michigan, for the Petitioner.

DECISION AND ORDER

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer¹ is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ As noted herein, the same Employer operates both facilities. The term "Employer" herein, depending upon the context, may refer to Tendercare (Michigan) either at the Adrian facility or at the Taylor facility.

3. A labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9 (c)(1) and Sections 2(6) and (7) of the Act.

5. The Employer, Tendercare (Michigan), operates the skilled nursing facilities at issue herein in Adrian, Michigan, and in Taylor, Michigan. The Petitioner seeks to represent, at each facility, a unit consisting of all registered nurses (RNs) and licensed practical nurses (LPNs), approximately 11 nurses in the petitioned-for Taylor unit, and 18 nurses at Adrian. The Employer, while agreeing that if elections are ordered there should be discrete units at the two facilities, maintains that all of the petitioned-for nurses are Section 2(11) supervisors.

The Taylor Facility:

The residents at the Taylor facility are located in five wings, served by a single nurses' station. Three RNs² and/or LPNs are assigned to each of three shifts,³ seven days a week, 24 hours a day.⁴ The Employer's overall managerial hierarchy is headed by Administrator Roxene Slaughter. The nursing function is managed by Director of Nursing ("DON") Mary Baskin, who reports to Slaughter, and an assistant director of nursing ("ADON"), who reports to Baskin. Also reporting to Slaughter and Baskin are Staffing Coordinator Tammy Carpenter, and the staffing development coordinator.⁵

The patient care functions on each shift are performed by domestic aides, certified nurse assistants (CNAs), and the nurses.⁶ Thus, on the day shift 14 CNAs undertake direct hands-on care and maintenance of the residents. A unspecified number of domestic aides perform

² The parties stipulated, and I conclude that the RN's are professional employees. The record indicates, that while the State of Michigan mandates an RN presence during certain time periods each day, the duties of the RN's and LPN's are largely the same.

³ Certain record evidence indicates that three nurses work on each shift. Other evidence indicates that the midnight shift is staffed by one "floor" nurse and one shift supervisor. Further, the parties stipulated, and I conclude, that midnight Shift Supervisor RoSaundra Pope exercises various indicia of supervisory authority and is a Section 2(11) supervisor.

⁴ Additionally, the parties stipulated that three nurses are "unit managers" on the day shift, that they possess indicia of statutory supervisory authority, and should be excluded as Section 2(11) supervisors. In accordance with said stipulation, I conclude that day shift Unit Managers Tim O'Connell, Timothy Varney, and Lisa Murphy are statutory supervisors.

⁵ The parties stipulated, and I conclude, that the administrator, DON, ADON, staffing coordinator, and staffing development coordinator are Section 2(11) supervisors. The positions of ADON and staffing development coordinator are currently vacant. Additionally, the parties stipulated, and I conclude that the quality assurance nurse and the treatment nurses are Section 2(11) supervisors.

⁶ The Employer has designated all of the disputed nurses as "nurse supervisors".

resident-related functions, but are not allowed to physically touch the residents. Three nurses undertake direct resident care, including passing medications and performing other medically related functions. Additionally, the nurses oversee the CNAs' and the domestic aides' administration of care to the residents. While three nurses are present on each shift, it is not clear how many domestic aides are present on any of the shifts or how many CNAs are present on each of the second and third shifts. The Employer, contrary to the Petitioner, maintains that the nurses maintain and exercise statutory supervisory authority vis-à-vis the CNAs. There is no evidence that Taylor nurses maintain authority in respect to the hire, lay off, recall, or promotion of other employees. While the record contains little evidence in respect to domestic aides, it appears that the below-described working relationship between nurses and CNAs also reflects the relationship between nurses and domestic aides.

CNA work assignments are centrally prepared by the staff coordinator, although nurses have the authority to adjust the assignments by, for example, changing a CNA's floor assignment, depending upon the exigencies of patient care and staffing. Further, during the second and third shifts when department⁷ heads are generally not present, a nurse can temporarily detail a CNA to a different department, such as dietary, in the event of staffing imbalances.

Breaks and lunch periods for CNAs are predetermined, but nurses retain and exercise the authority to rearrange breaks and lunch periods to meet the exigencies of patient care and staffing.

Staffing levels and floor assignments are also predetermined. Nurses, however, are empowered to call in additional staff, assign mandatory overtime, or call a temporary personnel agency if, due to employee absences, staff falls below levels required by State of Michigan regulation. During the day shift, such issues are handled through interaction between the staff coordinator and the nurse. During the midnight shift, the shift supervisor handles the situation. If a nurse assigns overtime to a CNA, the nurse authorizes payment for such overtime by signing the timecard of the CNA. If pool personnel are called in to meet State staffing requirements, the nurse signs their time cards, authorizing payment.

If a nurse concludes that a domestic aide or CNA has violated the Employer's work rules contained in the employee handbook, the nurse has authority to issue an "employee memorandum" to the offending employee. These rules cover a wide variety of employee conduct including attendance, attitude, behavior at work, work performance, timecards, etc. On the employee memorandum, also described as the disciplinary form, the nurse sets forth the offense, both by subject and a narrative of the facts, and decides which of three classes the offense falls into, with different levels of possible discipline flowing from each.⁸ While the

⁷ Departments include social work, activities, dietary, and office.

⁸ Class one violations call for discharge for a first offense. Class two violations provide for penalties ranging from a written warning to discharge. Class three violations result in penalties ranging from a verbal warning to discharge.

handbook sets forth the possible discipline for each class of offense, and the nurse decides the class of the offense, the actual imposition of any suspension or discharge must be approved at a higher managerial level.

The discipline form contains a series of boxes headed “Type of Action Taken.” The nurse who completes the form is supposed to check one of the following boxes: “written warning”; “2nd written warning”; “final written warning”; “suspension”; “discharge”; “other”. It would appear that in order to be able to check cogently one of the boxes, the nurse would have to either personally have knowledge of the employee’s prior disciplinary record or access to the personnel files. However, nurses do not have immediate access to such personnel files, but can gain access upon request to the DON or the keeper of the files.⁹

The Employer utilizes a progressive system of discipline that provides for a written warning, second written warning, final written warning, suspension, and discharge. The warning is prepared by the nurse, given by the nurse to the CNA, and a copy forwarded to the DON, who signs the form and places it in the employee’s personnel file without further investigation. While the DON and nurse may subsequently discuss the employee memorandum, the nurse prepares the document and presents it to the employee.¹⁰

Inasmuch as the Employer utilizes a progressive discipline policy, it appears that the employee memorandum, if there are repeated violations, plays a role in what could be the eventual suspension or discharge of an employee, although there are few instances where employees have been suspended or discharged. The nurse is empowered to use the discipline form to enforce the Employer’s entire panoply of employee handbook rules, not just those related to patient care. Thus, two of the employee memoranda in the record cite CNAs for break period violations.

In one instance, involving a CNA who reported to work when not scheduled, the nurse sent the CNA home, and completed an employee memorandum. The memorandum appears in the record with the suspension/discharge box checked.¹¹ The Employer discharged the CNA apparently without further investigation. The DON testified that the CNA was discharged based on the employee memorandum submitted by the nurse. However, the DON also

⁹ One nurse testified that she maintains knowledge of the CNAs prior discipline and does not need to access the personnel files.

¹⁰ There was some inconsistency in the testimony of nurses. It appears from the record that the Employer has empowered the nurses to prepare and present the discipline forms as indicated. It also appears that some nurses have been exercising such authority and some have not. Finally, it appears that the floor nurse on the midnight shift defers to the midnight shift supervisor, a stipulated Section 2(11) supervisor, in respect to such discipline forms, and that a second shift nurse, Crystal Grace, a recent hire and probationary employee, does not exercise the panoply of authority exercised by other nurses. While the record suggests that such non-exercise may be due to her probationary status, there is no evidence from which to conclude that such is the case.

¹¹ The form in question was an earlier version, that had a single box for suspension/discharge, rather than the separate boxes as in the current form.

testified, “The young lady was not terminated. The young lady discharged herself. Her certification was not up-to-date at that time, so she could not work, based on those issues.” The nurse involved testified that she did not check any box on the form and only wrote up the incident on an employee memorandum form because the DON instructed her to do so.

The employer also makes available to nurses a “suggestion for improvement” form for instances in which a nurse determines that a CNA’s performance is lacking, but does not reach the level mandating the usage of the employee memorandum. The Employer does not consider the suggestion for improvement form to be discipline, and such is not part of the system of progressive discipline.

Nurses possess authority to send home an employee who, in the nurse’s opinion, is inebriated or otherwise a danger to the residents. Such action is mandated by State regulation. However, in one instance, a nurse sent home and caused the discharge of a probationary CNA during a weekend shift, for behavioral problems, and left a note for the DON. The DON affirmed the discharge, without further investigation, and placed the discharge note in the employee’s personnel file.

The Employer also assigned nurses the task of completing 30-day, 60-day, and 85-day evaluations of probationary CNAs.¹² The form has a space for nurse recommendations in two areas: 1. “Is it in the best interest of the company and the employee to continue employment?”; 2. “Should the employee’s probationary period be extended? If yes, how long?” There is evidence that a probationary employee’s probation was extended after such a recommendation by a nurse.

The nurses also complete a yearly evaluation for non-probationary CNAs. There is no evidence that the evaluations are utilized as a basis for rewarding employees. The Employer has utilized negative evaluations as a basis for mandating that the employee attend additional in-service education. The DON utilized a negative evaluation as a basis to discharge the affected employee, upon recommendation of the nurse, without further investigation.

The nurses, as they make their rounds, oversee the work of the CNAs and domestic aides. The work of the CNAs is largely routine and absent exceptional circumstances does not require continuous supervision. As noted, CNA floor and room assignments are predetermined, but can be changed by nurses depending on the exigencies of the staffing situation. The administrator and DON generally work during the day shift and although there are no supervisors present during significant portions of the second and midnight shifts, all nurses have access to the DON by phone, and are expected to call her in the event of emergency or unusual situations. This also pertains to weekend shifts, except that at least one department head is generally present to deal with potential State administrative inspections.

¹² There is mixed evidence as to the extent nurses complete these forms, but at least some nurses complete these evaluation forms for probationary employees.

A job description is generally presented to new nurses upon their hire. Pertinent provisions provide that a nurse “assures sufficient number of nursing staff, assigns duties, and supervises nursing assistants to assure appropriate care is provided using proper procedures and techniques on assigned tours of duty;” and, “evaluates nurse assistants performance, takes appropriate disciplinary action when needed, and makes recommendations for continued employment.”

The Adrian Facility:

The Adrian facility has a 120 patient capacity, with a current census of 99 patients, on four wings. The four wings, A, B, C, and D, form an “x” pattern with two nurses’ stations in the middle of the “x”, one covering the A/B side, and one the C/D side. One nurse is assigned to each wing on the day shift. On the afternoon shift four nurses work the first four hours of the shift, and two the last four hours. Two nurses work the midnight shift. Twelve CNAs are assigned to the day shift, with eight CNAs assigned to the second and midnight shifts.

The overall manager of the facility is Administrator Deb Cashdollar. The nursing department is managed by Director of Nursing Michele Pickles. An assistant director of nursing (“ADON”), staff development coordinator, RN medical case coordinator, and unit manager work on the dayshift during the week, and report to the DON.¹³

As at Taylor, there is no evidence that nurses possess or exercise the authority to hire, promote, layoff, or recall employees. As to staff levels, overtime, appraisals, probationary reviews, and direction, breaks, and assignments, Adrian nurses maintain and exercise the same type of authority described above in respect to the Taylor nurses.

Adrian nurses use the same discipline forms as Taylor. The “suggestion for improvement” form is not considered to be discipline, but is to be utilized by the nurse for situations in which a nurse determines that a CNA has not performed in a satisfactory manner, but the action has not reached a level that the nurse determines requires the usage of the “employee memorandum” form, which is considered discipline.

The procedure for usage of the employee memorandum, or disciplinary, form is as follows. If a nurse determines that a CNA’s conduct violated the work rules, the nurse completes and signs the form, hands it to the CNA, and forwards the form to the DON, who signs the form and places it in the CNA’s personnel file. Inasmuch as the Employer follows a progressive system of discipline, the placing of the employee memorandum in an employee’s personnel file could then serve as the basis for greater discipline for future violations.

¹³ The parties stipulated, and I conclude, that the administrator, DON, ADON staff development coordinator, RN medical case coordinator, and unit manager maintain and exercise supervisory authority, and are Section 2(11) supervisors.

The form, as at Taylor, requires the nurse to complete the following questions or check the following boxes: “1. Type of Action Taken: written warning; 2nd written warning; final written warning; suspension; discharge; other. 2. State subject or code of conduct violation. 3. Date of violation. 4. Number of prior written warnings on file. 5. Describe in detail information you have available which supports taking the above course of action. List witnesses to incident if possible. State what action will be taken if problem persists. 6. State what corrective action you feel the employee may take to eliminate the above problem area. 7. Employee comment. 8. Employee signature. 9. Supervisor signature. 10 If the above pertains to a suspension or discharge, the Facility Administrator must also sign the form.”

The question calling for a code for the conduct violation apparently is in reference to the employee handbook which sets forth numerous employee violations, and divides the violations into three classes, with different degrees of discipline assigned to each class of violation. In order to indicate whether the warning is a first, second, or final warning, the nurses, which do not have immediate access to personnel files, must request such access from higher management or the keeper of the files. Some nurses indicate that such access is not necessary as they are familiar with the CNA’s prior discipline, and some nurses do not bother to complete this portion of the form.

According to the Employer’s policy, the nurse unilaterally determines when it is necessary to utilize the employee memorandum form, decides which class the violation (and possible discipline) falls in to, completes the form, hands it to the employee, provides the employee with union representation upon request,¹⁴ and forwards the form to the DON. The nurse is not required to consult with management during this process, but approval is required prior to suspension or discharge being imposed. This procedure was reviewed with the nurses during a meeting on August 5, 1999.

The employee memoranda forms in the record indicate that nurses complete the forms as described above, with certain exceptions on some of the forms. Some of the forms reflect the signatures of higher management, along with the nurse, and on other forms the nurse did not place the violation into one of the three classes set forth above. However, many of the forms in the record do indicate such classification, and only contain the signature of the nurse and/or the affected employee.

The record does not detail instances where disciplinary memoranda were utilized by the Employer as a basis upon which to later discharge CNAs as part of the progressive disciplinary system. However, in one instance, a nurse who wrote a disciplinary warning, categorized the violation as a class 1 violation for which discharge is a possible consequence, but instead issued the written warning as part of the progressive discipline procedure. The DON placed the warning in the employee’s personnel file and did not further investigate, nor take further action. According to the DON, nurses have not checked the discharge box on the employee

¹⁴ The CNAs are part of a bargaining unit at Adrian currently represented by the Petitioner. There is no bargaining representative at Taylor.

memoranda form based on their respective exercises of discretion as to what level of discipline is appropriate. The nurses are empowered to utilize the employee memoranda as to any CNA violations of its employee rules and not those limited to patient care. Among the disciplinary memoranda in the record, one cites a CNA for failing to punch out and then in when leaving and then returning to the facility, and another memorandum cites an employee for insubordination.

Analysis:

Section 2(11) of the Act defines a “supervisor” as:

...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As the Board and courts have stated, the statute requires the resolution of three questions and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in one of the 12 listed activities? Second, does the exercise of that authority require “the use of independent judgment”? Third, does the employee hold the authority “in the interest of the employer”? *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778, 146 LRRM 2321, 2322 (1994). It is well established that the possession of any one of the indicia set forth in the Act is sufficient to confer supervisory status if the authority is exercised with independent judgment and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981).

The supervisory status of nurses in the instant case turns on whether they exercise the authority to discipline because of their involvement in the employee memorandum and appraisal process; their role in staffing decisions, including assignment and approval of overtime, accessing employees from temporary agencies, and temporarily moving CNAs to a different floor assignments or departments; their assignment of work to and direction of CNAs, and sending home employees unfit to deal with patients because of temporary conditions such as being inebriated.

With respect to the scheduling, assignment and direction of CNAs, including the rescheduling of breaks, at both locations, it appears that the master work schedule and daily work assignments are centrally formulated so that nurses receive an already prepared work schedule for the CNAs. Subsequent assignments, reassignments, re-scheduling of breaks, and directions by the nurses are patterned upon the established schedule and practice in a manner which is essentially routine in nature, and does not require the exercise of independent judgment. Specifically, the nurses’ assignment to CNAs, including temporary details to other

departments or floors, are merely reflective of patient census and the exigencies of workload needs, and require no more judgment than garnered by the nurses' experience and training. **Hillhaven Rehabilitation Center**, 325 NLRB 202, 203 (1997); **Illinois Veterans Home at Anna L.P.**, 323 NLRB 890, 891 (1997).

As to their role in the disciplinary process, at both locations, the nurses are charged with initiating discipline in respect to the CNAs. Exercising independent judgment and discretion, nurses identify conduct which violates employee work rules or is otherwise inappropriate, complete the employee memorandum disciplinary form which involves placing the conduct in one of three classes of violations, each one of which has discrete pre-assigned punishment, present the disciplinary form to the offending employee, permit union representation (at the Adrian facility), and transmit the memorandum to the DON. The DON places the form in the offending employee's personnel file, without independent investigation. The disciplinary forms in the record run the gamut of rule violations from patient care related infractions to break or time-clock violations.

The authority of the nurses to determine unilaterally employee violations of the work rules, to determine which class of rule violation is involved, and to present the warning notice as part of a progressive system of discipline to the employee, is indicative of supervisory authority, particularly where the warning is placed into the offending employee's personnel file without further investigation or review by higher supervisory authority. **Heartland of Beckley**, 328 NLRB No. 156 (July 27, 1999); **Wedgewood Health Care**, 267 NLRB 525, 526 (1983). While the employee memoranda in the record do not reflect nurse recommendations for discipline beyond written warnings, these are significant because of the Employer's progressive system of discipline.

While annual CNA appraisals undertaken by nurses do not normally result in consequences beyond retraining, appraisals of probationary employees have resulted in extended probationary periods, and even discharge in one case at Taylor.

Finally, while the assignment of optional or mandatory overtime to CNAs reflects the Employer's pre-determined staffing levels in accord with State of Michigan regulations, the nurses here are further empowered to call a temporary agency, request the needed staffing, and then sign the timecards of the temporary workers, authorizing payment.

In view of the foregoing, and the record as a whole, I conclude that the nurses at Taylor and Adrian exercise authority in the interest of the Employer which requires the use of independent judgment, and that such authority extends to the enforcement of the Employer's major personnel policies, and is not merely an outgrowth of their training or incidental to their patient care responsibilities. **Wedgewood Health Care**, supra at 527.¹⁵ Accordingly, I find that

¹⁵ Further, finding the nurses to be supervisors would not present an unrealistic supervisor to employee ratio at either facility.

the nurses are supervisors within the meaning of Section 2(11) of the Act, and I shall dismiss the petitions herein.

ORDER

IT IS HEREBY ORDERED that the petitions filed herein be, and they hereby are, dismissed.¹⁶

Dated at Detroit, Michigan, this 26th day of November, 1999.

(SEAL)

/s/ William C. Schaub, Jr.
William C. Schaub, Jr., Regional Director
National Labor Relations Board
Region Seven
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 482266-2569

177-8520-0800
177-8540-8050

¹⁶ Under the provisions of Section 102.67 of the Boards's Rules and Regulations, a request for review of this decision may be filed with the **National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW., Washington, D.C. 20570**. This request must be received by the Board in Washington D.C. by December 10, 1999.